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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAVIER JOAQUIN LUQUE et al., Defendants and Appellants.	E046801 (Super.Ct.No. FSB059205) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant Javier Joaquin Luque.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant Albert Amaya.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Albert Amaya (Amaya) of attempted extortion (Pen. Code, § 524)[1] and found that he had committed the crime for the benefit of a gang (§ 186.22, subd. (b)(1)(B)). In bifurcated proceedings, Amaya admitted having suffered two strike priors (§ 667, subds. (b)-(i)) and two violent felony priors for which he served prison terms (§ 667.5, subd. (a)). The jury convicted Javier Luque (Luque) of carjacking (§ 215, subd. (a)), during which he used a handgun (§ 12022.53,. subd. (b)). In bifurcated proceedings, Luque admitted having suffered a strike prior and five prior convictions for which he served prison terms. Amaya was sentenced to 25 years to life and appeals, claiming both theories of his guilt for attempted extortion were improper. We reject his contentions and affirm. Luque was sentenced to 32 years and appeals claiming he should be resentenced, and, if not, the sentencing court erred in imposing the upper term for the carjacking. We reject his contentions and affirm.

FACTS

Amaya belonged to a Baldwin Park gang, which was aligned with the San Bernardino gang to which Luque belonged and the two men were friends. At 10:20 p.m. on August 21, 2006, Luque, using a handgun, carjacked the victim's car while the latter

[1] All further statutory references are to the Penal Code unless otherwise indicated.

was giving Luque and his girlfriend a ride and while the victim's five-year-old sister was in the car. That night and the following day, the victim received threatening phone calls about his car, and money was demanded for its return to him, all of which will be described in greater detail below. After the last call, Amaya appeared as a passenger in a tow truck which was towing the victim's car. Amaya threatened to impound the victim's car if the victim did not have the money that had been demanded of the victim during the phone calls. The police arrived and Amaya tried to walk away.

Luque's attorney admitted at trial that Luque had committed the carjacking, although he contested the gun use and gang allegations.

1. *Amaya's Appeal*

Amaya contends that his conviction of attempted extortion must be reversed because it is based on two alternative theories, the first of which is supported by insufficient evidence and the second of which is legally insufficient.

The victim testified that during the carjacking, Luque used the victim's cell phone to call someone saying, "'I already have it and I'll take it to you in ten minutes[,]'" "'I think it doesn't have rims[,]'" and "'I believe it doesn't have [a sound system,]'" all of which the victim interpreted to be in reference to his car. There was evidence presented at trial from which a reasonable jury could conclude that this call was made to a cell phone owned by Amaya's wife.

Luque's girlfriend[2] testified that at some point while they were in the victim's car, Luque made a phone call in which he said he was "coming over there."[3] After getting the victim and his little sister out of the victim's car, Luque got on the freeway and drove to Amaya's house in Banning, after stopping at a gas station near the freeway. At Amaya's house, Luque and Amaya talked. Luque's girlfriend heard Amaya tell Luque that he was going to call the tow truck. She heard Amaya say during a conversation on a cell phone that he wanted to and was going to return the car and he was going to call a tow truck.

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[2] She had pled guilty to carjacking, with a gang enhancement and a gun use by a principal enhancement. In exchange for her truthful testimony during this trial, she was to be sentenced to up to 19 years and eight months in prison. Before entering the plea bargain, she was facing 15 years to life, plus 13 years. She had been held in custody up to the time she entered the plea, and, thereafter, was released. She was six months pregnant at the time of trial, and had four other children. She testified she and Luque were doing methamphetamine before the carjacking, she was high during the carjacking, which impacted her memory of it, and she was still feeling the effects of the drug while at Amaya's house after the carjacking. She read the police report of the carjacking before entering her plea bargain and being interviewed by two prosecutors because she was "so tweaked out on meth [that she] really didn't know what was going on[.]" She testified that she did methamphetamine daily and was a heavy user. She admitted that her memory of the night of August 21 was "pretty bad." However, she also testified that after her memory was refreshed by her preliminary hearing testimony, she recalled seeing Luque talk on the victim's cell phone during the carjacking. She also remembered hearing Amaya talking on a cell phone later while at his house about a tow truck and returning a car. He also asked during the phone call, "Did you call the cops?"

[3] Luque's girlfriend testified that neither she nor Luque had a cell phone that day and that Luque used the victim's cell phone to make this call. The victim testified that Luque used the victim's cell phone to make one phone call during the carjacking, but when the victim got out of his car, the victim threw his cell phone out of the car and retrieved it after Luque drove off. Therefore, this call by Luque must have been made during the carjacking. At the preliminary hearing, Luque's girlfriend testified that Luque used the victim's cell phone while the victim and his little sister were still in the car.

She also heard Amaya say during a cell phone call that "if they do not call the cops he would take the car back"[4] and/or, "Did you call the cops?" She further heard Amaya call a tow truck.[5] She said Amaya made only one call. She testified that Luque was standing next to Amaya when Amaya was using the phone.[6]

The victim testified that after he retrieved his cell phone where he and his sister had been put out of the victim's car by Luque, and called the police, the police instructed

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[4] She later testified that she did not remember whether anyone used a cell phone at Amaya's house. (See fn. 2, *ante*, p. 3.) However, still later, she testified, after having her recollection refreshed by her preliminary hearing testimony that she remembered hearing Amaya say, during a cell phone conversation at his house, something about a tow truck and returning the car and Amaya also asked the question, "Did you call the cops?"

Amaya, in his reply brief, misstates what the People stated in their brief on this subject. The People stated, "[Luque's girlfriend] further established that Amaya was the male [the victim] heard on the phone the night of the carjacking, when one of the threats to [the victim's] . . . safety was made. Although she did not hear the entire threat, what she heard—Amaya's reference to the police and to towing [the victim's car]—ties Amaya to the full threat to injure [the victim] . . . if [the victim] did not provide the money and call off the police." In his reply brief, Amaya says of the foregoing, "[T]he prosecution was unable to introduce any evidence that [Amaya] himself made the threat on the telephone. [(This is not true.)] . . . [R]espondent concedes the lack of such evidence in [their] brief. (R.B. p. 9 [conceding Luque's girlfriend] did not hear [Amya] threaten anyone on the telephone].)"

While Luque's girlfriend, after testifying that she heard Amaya say on the phone that "if they did not call the cops he would take the car back" testified that she did not hear or did not remember hearing Amaya make threatening statements on the phone, this did not contradict her testimony about hearing Amaya say that he could take the car back if the police were not called. What Luque's girlfriend considered to be a threat may not coincide with what the law on extortion considers to be a threat.

[5] At the preliminary hearing, she testified that she also saw Luque use a cell phone while at Amaya's house, but at trial she said she did not recall this happening.

[6] She did not specify for which call or calls this occurred or whether it took place on August 21 or 22 or both.

him to call back the number Luque had called during the carjacking, which the jury could reasonably conclude had been made to Amaya's wife's cell phone. A woman answered and told the victim he had the wrong number. Fifteen minutes later, a man called from that same number and told the victim he better not have called the police. The caller said he would find out if the victim called the police, which the victim took as a threat. The caller told the victim to tell the police that the whole thing was a practical joke and doing this was the only way the victim would get his car back. The caller said the victim had better do this because the victim "did not know who he was fucking with[,]" which the victim also took as a threat. The caller did not have the same voice as Luque or as the person or persons who called the victim the next day. The victim later told the police that the caller had told him that the victim had better not have called the police and if the victim called the police and told them anything about the caller, the caller knew where the victim lived, but if the victim had not called the police, the victim would get his car back the next morning with the keys underneath it.

The victim testified that on August 22, he received five calls concerning his car—during the first, he was asked if he wanted his car, during the second, he was told to have the money ready and was told not to call the police and during the third he was again told to have the money ready and not to call the police and he was asked for directions to his house. The victim was not sure if Amaya had made these calls. During one of these three calls, the caller asked the victim, "'Did you do what I told you? Call the police and tell them it was just an old friend playing a practical joke on you[.]'" The victim testified

that he found this "[k]ind of" threatening and he told the caller that he had called the police and told them that the whole thing was a practical joke. During one, some or all of these calls,[7] the victim had been told to have over $1,300 ready and a tow truck would deliver his car to his home. The victim asked the caller why he had to provide so much money and the caller said that the victim's car was in San Pedro and the caller had to charge for the tow truck and mileage. The victim offered to go get the car himself, but the caller declined, telling the victim his car would be there soon. The caller told the victim that the victim better not have called the police, which the victim took as a threat and to which he responded he had not. There were other calls made that day by the same caller in which the victim was told to have the money ready and was asked directions to his house. At 6:17 p.m., the victim received a fourth call, which came from a phone the jury could reasonably conclude belonged to Amaya's wife. The caller, who was different from the caller who had made the three earlier calls, told the victim that the car was nearby and the victim was to have the money ready and nobody would get hurt, which caused the victim concern.[8] After some time passed without the car appearing, the victim called back the number and asked what was happening with the car. He talked to the same caller he had spoken to during the previous call. The victim did not know if either

[7] The victim was not specific.

[8] The victim told the police that the caller of calls one through three and five sounded like the same person, but was different from the person who made the fourth call. At trial, the victim testified that all the calls on August 22 were made by the same voice, except, maybe ("pretty sure"), the last one and neither were the one he had heard on August 21.

of the voices he heard on August 22 was Luque's. He could not say that either voice was Amaya's, but he could not say that either was not. The last caller did not have the same voice as the caller who spoke to the victim on the phone on August 21. In fact, five calls had been made to the victim's cell phone on August 22 between 3:48 p.m. and 6:17 p.m., the last of which had been made from what a reasonable jury could conclude was a cell phone belonging to Amaya's wife. The victim testified that either during the call on August 21 or one of the calls on the 22nd, the caller said, "'You don't know who you're fucking with because I do know where you live.'"

Luque's girlfriend testified on August 22, she heard Amaya on the phone saying that the car was being taken back to the person with whom Amaya was speaking. The afternoon of August 22, she saw a tow truck hook up the victim's car and take off with Amaya inside the tow truck, after Amaya had spoken to the tow truck operator.

The victim testified that around 5:00 p.m. on August 22, a tow truck pulled up in front of his house towing his car. The victim's brother called the police. Amaya was a passenger in the tow truck. The victim went into the street and Amaya got out of the tow truck and approached him. Amaya said to the victim, "'You got the money?'" The victim told Amaya that he had some, but not all, of the money. Amaya said, "'Well, give me that and me and my boy[9] are going to get something to eat . . . . We'll come back later when you have the rest of the money.'" The victim asked Amaya, "'What happens

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9 There was no evidence that there was anyone else present beside Amaya, the tow truck driver and the victim.

if I don't have all the money?'" The victim testified that Amaya said "that he was going to end up taking the car to, I believe, an impound lot or something like that." The victim testified that the police arrived before he had a chance to give the money to Amaya and the victim did not talk to the tow truck driver.

The jury was instructed as to both charged offenses of dissuading the victim from reporting a crime and attempted extortion, "The People have presented evidence of more than one act to prove that [Amaya] committed th[ese] offense[s]. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed." In connection with both offenses, the jury was instructed, "For you to find a person guilty . . . that person must not only intentionally commit the prohibited act, but must do so with the specific intent. The act and the specific intent required are explained in the instruction for that crime . . . ." The jury was further instructed, in pertinent part, "To prove that a defendant is guilty of the crime of extortion by threat or force, the People must prove that: First, the defendant threatened to unlawfully injure another person . . . or the property of another person . . . . Second, when making the threat, the defendant intended to use that fear to obtain the other person's consent to give the defendant money."

During argument to the jury, the prosecutor said of the charged dissuasion of a witness, "[W]hat we are talking about here are these phone calls that [the victim] got . . . the night of the [21st] and the next day. . . . [H]opefully you don't expect me to

stand up here in front of you and try to prove to you that . . . Amaya himself made those phone calls. I am not going to do that. I don't need to do that. I don't think that I can. [¶] . . . [E]ven if [the victim testified that] Amaya's voice[was] . . . the voice on the phone calls . . . would that by itself be enough to convict him beyond a reasonable doubt? [The victim had] never talked to . . . Amaya before. He never heard his voice before. You can't expect him to make a positive identification. So I am not going to . . . try to say [that] . . . Amaya was the person who actually made the phone calls. [¶] [Amaya] . . . probably was, but *you don't need that*. He could have been making the phone calls. He could have been directing a person to make the phone calls. He could have been standing next to a person making the phone calls. . . . Amaya's fingerprints are all over it from the carjacked car getting to his house to the very end. This is his show. . . . [¶] . . . [¶] . . . Amaya is involved in [all the] phone calls . . . from the time Luque got to his house. Whether he personally made the call or he was standing there or directed someone to, he was involved . . . ." The prosecutor argued that it was Amaya whom Luque called during the carjacking. He also asserted that Amaya had to have known the victim's car had been stolen when it arrived at Amaya's house on August 21. He pointed out that Luque's girlfriend had testified that she heard Amaya on the phone the night of August 21 talking about a tow truck and saying, "Don't call the police." He also pointed out that the call the victim received on August 21 and the last one he received on the 22nd came from what the jury could reasonably conclude was Amaya's wife's cell phone. The prosecutor then said of the fact that a phone connected to Amaya

was used on both dates, " . . . [I]t tells you . . . Amaya is involved in attempted extortion and dissuading a witness . . . ."

The prosecutor argued that Amaya was guilty of dissuading the victim from reporting the carjacking "either by making phone calls or direting them or being there when they were made." He asserted that the acts constituting the offense occurred during the calls on August 21 and the 22nd.

As to the charged attempted extortion, the prosecutor said, "This is trying to get [the victim] to pay for his own car that was carjacked from him the day before." As to the element that Amaya threatened to injure a person or property, the prosecutor argued that that occurred during the call on August 21 and the calls on the 22nd. As to the element that Amaya intended to use fear to obtain the victim's consent, the prosecutor referred to the argument he had just made about the first element of the offense. He added, "[Amaya was] obviously . . . trying to intimidate [the victim] or directing the intimidation, however you want to look at it." The prosecutor added that when Amaya showed up with the victim's car and said it was going to be impounded if the victim did not have all the money that had been demanded during the calls, he was "using fear, threatening to injure [the victim's] property." Finally, as to the element that as a result of the threat, the victim consented to give money, the prosecutor argued that the victim gave his consent on the phone and was about to give Amaya the money on August 22.

The jury was given no instructions about aiding and abetting or the liability of coconspirators. The jury acquitted defendant of dissuading the victim from reporting a crime.

Amaya contends that if the jury convicted him on the basis of any of the phone calls, there is insufficient evidence to support it, therefore that theory of his guilt is factually insufficient. Specifically, he asserts that because the prosecutor conceded that he could not prove beyond a reasonable doubt that Amaya made any of the calls, there was no basis, given the instructions the jury had before it, to convict him on that theory. Indeed, the instructions on attempted extortion called upon the jury to find that Amaya *himself*, and not anyone else, had made at least one of the calls in which the victim's person or property was threatened. Had the jurors been given aiding and abetting or conspiracy instructions, we would have no difficulty rejecting Amaya's contention, but they were not. They were given no basis upon which to convict Amaya of attempted extortion if, as the prosecutor argued, the evidence showed beyond a reasonable doubt only that he directed someone else to deliver the threat(s) or was next to the person or persons who did that. We do not agree with Amaya that, apart from the prosecutor's unfortunate concession, the evidence was insufficient to prove that Amaya had made at least one of the calls in which the victim's person or property was threatened. Additionally, in our view, the evidence was sufficient to prove that Amaya aided and abetted whoever made the calls. The problem arises because the prosecutor told the jury that it could make the necessary finding that Amaya, himself, had threatened the victim,

without actually so finding and while conceding that the evidence did not show this beyond a reasonable doubt, although it did show that Amaya either directed someone else to make the threat or was present when someone else did.

Amaya next contends that if the jury convicted him on the basis that he threatened to put the victim's car into impound "or something like it" on August 22, this was legally insufficient to constitute an attempted extortion. We disagree.

First, Amaya contends that the threat was legally insufficient because "a threat *by a tow truck operator* to take a vehicle to an impound lot to collect towing fees is specifically authorized by statute." Unfortunately for Amaya, the threat was not delivered by the tow truck operator, but by Amaya. There was no evidence Amaya was operating as an agent of the tow truck operator when he made this threat. Therefore, Amaya cannot cloak himself in the immunity the law provides the tow truck operator, who, according to the only evidence presented at trial on the matter, said nothing to the victim.

CALJIC No. 14.72, as it read at the time this offense was committed, provided, "The words 'unlawful injury' [in the definition of extortion] mean an injury which, if inflicted, would create civil liability against the person doing it and would support a civil action against . . . him . . . . A threat to do that which one has a legal right to do is not a threat to do an unlawful injury."**[10]** If the police had not arrived and the victim had not

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[10] This instruction was based on language by the California Supreme Court in denying a hearing in *People v. Schmitz* (1908) 7 Cal.App. 330, "If the injury threatened to property is one which *the person threatening* has an absolute legal right to do, he cannot

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turned over all the money that had been demanded by Amaya and his car had been taken to impound as Amaya promised it would be, the victim would have had a civil cause of action against Amaya for illegally having his car towed and incurring expenses for the towing and the impound. If the tow truck driver had threatened the victim to take his car to impound if the victim did not pay whatever the towing fees actually were (and we have no idea whether the amount demanded by Amaya constituted legitimate towing fees), we would have a different issue. But the tow truck driver said nothing to the victim.

Second, Amaya asserts, without analysis, that his threat to impound the victim's car was insufficient to support the conviction because there was no evidence that the victim or his car would be harmed. Amaya takes too narrow a view of the acts that constitute threatening to do an unlawfully injury to the property of the victim. (§ 519, subd. (1).) The cases he cites in his brief prove our point. In *People v. Bolanos* (1942) 49 Cal.App.2d 308, 311, the appellate court concluded that such injury was "'unrest, discord, dissatisfaction, strife, trouble, and labor strikes among employees'" that would "'disrupt and destroy the business and property of [the company's owner] and [the company] . . . and thereby destroy the value of the plant, business and property . . . .'" In

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be held to have threatened 'to do an unlawful injury' to the property . . . . [¶] . . . Giving to such term the broadest meaning possible under the authorities, it can include no injury that is not of such a character that, if it had been committed as threatened, it would have constituted an actionable wrong, an injury for which an action for the resultant damages could be maintained against the defendant, or which, if merely threatened, could be enjoined in equity if the remedy at law were deemed inadequate." (*Id.* at p. 370, italics added.)

People v. Sanders (1922) 188 Cal.744, 756, the California Supreme Court held that the injury must be "of such a character that if committed as threatened would have constituted an actionable wrong[.]" In *Sanders*, the injury was the wrongful incarceration of the victim in county jail. (*Id*. at p. 755.) *Sanders* cited with approval a New York case in which the injury was the boycott of a business. (*Id*. at p. 757.) The unlawful withholding of the victim's car from him and the resulting interference with his use and enjoyment of it is no less an injury to his possessory interest in it as is the disruption of a business or the incarceration of a person.

So, what is the consequence of the prosecutor's invitation to the jury to convict Amaya of attempted extortion on the basis that he either directed or stood next to the person who made the calls, which, given the absence of aider and abettor instructions, rendered the evidence of his guilt insufficient?

"*People v. Guiton* (1993) 4 Cal.4th 1116 . . . [¶] . . . teaches that if a jury is presented with multiple theories supporting conviction on a single charge and on review one theory is found unsupported by the evidence, reversal is not required if sufficient evidence supports the alternate theory and there is no affirmative basis for concluding the jury relied on the factually unsupported theory because it is presumed jurors would not rely on a factually deficient theory." (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1740.) Here, the fact that the jury acquitted Amaya of dissuading the victim from reporting the carjacking to the police, which occurred only during the calls on August 21 and the 22nd, suggests that the jury accepted the prosecutor's concession that he could

not prove beyond a reasonable doubt that Amaya was one of the actual callers. Given the fact that the jury was instructed that Amaya, himself, had to have been the one to make the threat, the jury was left only with Amaya's statement on August 22 in person to the victim that the car would be impounded. The presumption noted in *Guiton*, common sense and the jury's verdict on the dissuasion charge dictate that the jury relied on this fact in convicting Amaya of attempted extortion and, because we reject Amaya's assertion that this theory was legally insufficient, the conviction must be affirmed.

2. *Luque's Appeal*[11]

a. Remand for Resentencing

The sentencing court imposed the upper term for Luque's conviction of carjacking, finding no circumstances in mitigation and the following aggravating factors: the crime involved a threat of great bodily harm, it was callous in that Luque left the victim and his five-year-old sister in an unfamiliar and rough neighborhood in the dark, the sister was particularly vulnerable due to her age, Luque was armed with a weapon, his past history shows that he presents a potentially serious danger to society, his past convictions are numerous, he was on parole when he committed this offense and his prior performance on parole or probation was unsatisfactory.

Luque contends that remand for resentencing is appropriate because remarks by the sentencing court showed that it believed it was not bound by the California Rules of

[11] Although Amaya, in his opening brief, joins in arguments in Luque's brief to the extent he may benefit from them, he may not.

Court. Defense counsel said during the sentencing hearing that "there's certain rules regarding when the aggravated term can be imposed." The trial court disagreed. Defense counsel said he was referring to the Rules of Court. The sentencing court responded, "[The] Rules of Court ha[v]e been amended because of the fact now the Court is able to impose any sentence the Court feels is appropriate and just give reasons for it. . . . [T]here used to be [rules] before the legislature changed the law on this to conform with . . . [¶] . . . [¶] *Cunningham*[*v. California* (2007) 549 U.S. 270] . . . To comply with that[,] the legislature changed the law that provides that the Court can [impose] . . . any one of the three sentence[s] and only has to use sound discretion in doing so and state on the record reasons. There's no longer an assumption there was going to be the midterm . . . . [I]n order to [impose] higher than the midterm it was necessary for the Court to take into consideration factors that have not been proved [to] the jury. They corrected that by saying now the Court has the ability to impose any of the terms as long as we can state a reason." Defense counsel argued that under California Rules of Court, rule 4.420(c), the upper term could not be imposed based on Luque's strike prior and four prior convictions, for which he served prison terms, because he was being punished for those as enhancements to his sentence. He also argued that the sentencing court could not rely on Luque's use of a gun during the crime as an aggravating factor because, he asserted, it was an element of the offense and, as such, using it would violate California Rules of Court, rule 4.420.[12] He added that it also could

[12] Rule 4.420 prohibits the use of an element of the offense as an aggravating

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not be used as an aggravating factor because it was going to serve as the basis for an enhancement. The sentencing court responded, "I didn't get from [the prosecutor's] argument that he was suggesting the very fact there had been a carjacking was the grounds for [imposing the upper term], rather the manner in which the carjacking occurred. In other words there is a [five]-year-old child involved in it . . . . [S]ome of the factors that came up during the trial were the fact that the victim and his sister were let out in the middle of the night in a location on the street without any means of transportation in an area that was basically not considered to be as safe as it could be. [¶] I do consider the fact . . . that this crime . . . [i]s probably the most unsophisticated carjacking I've ever heard [of]. . . . At the same time it does have a threat of significant violence . . . . The sentencing court then imposed the upper term, noting that it had "review[ed] the criteria pursuant to [California Rules of Court] Rule 421 and Rule 423 . . . ."

Contrary to defendant's assertions, the trial court's remarks did not indicate that it felt it was not bound by the California Rules of Court. Rather, the trial court disagreed with defense counsel that relying on Luque's record and the fact that he was armed with a gun during the offense did not constitute dual uses of facts, as prohibited by the Rules of Court.

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factor.

b. Imposition of the Upper Term for Carjacking

1. *Dual Use of Facts*

Defendant asserts that the threat of great bodily harm, his *being armed*[13] with a weapon, the vulnerability of the victim's sister and the callousness of the crime due to the fact that the victim and his sister were put out of the victim's car in a bad neighborhood late at night are "all factors inherent in either the carjacking itself or the weapon enhancement . . . ." First, none of these facts are inherent in the crime of carjacking. Second, while we agree with Luque that *if* his use of a gun presented the only threat of great bodily harm, the sentencing court could not use it as both an enhancement and an aggravating factor without violating the proscription on dual use. However, it was not. The fact that Luque put the victim and his five-year-old sister out of the victim's car in a rough neighborhood they were unfamiliar with in the middle of night was neither part and parcel of his use of a gun during the carjacking nor was it an element of that offense. As to the fact that Luque was *armed* with a gun, it was not used as an enhancement; therefore, there was no prohibited dual use.

Luque asserts that the sentencing court violated the dual use prohibition by using the facts that his past convictions indicated that he posed a danger to society and they were numerous to impose the upper term because they also served as the basis for enhancements. He is incorrect. Besides the five prior convictions, only four of which

[13] Luque asserts that the sentencing court relied on his *use of* a gun. The People make the same error in their brief. However, the sentencing court relied on the fact that Luque was *armed with* a gun.

served as the basis for enhancements, defendant was also convicted of the misdemeanor of carrying a concealed weapon in a car, the misdemeanors of possessing a controlled substance and carrying a loaded firearm in a public place, and the felonies of grand theft from a person and possession of a firearm.[14] None of these served as the basis for enhancements. Luque does not argue, nor could he, that these convictions were not numerous and they did not indicate that he posed a danger to society.

2. *Factual Basis for Certain Factors*

Without offering a cogent argument, Luque asserts that the victim's five-year-old sister was not particularly vulnerable. We disagree. The fact that Luque did not communicate with her or touch her in any way during the carjacking does not persuade us otherwise. For a five-year-old child to be carjacked by someone armed with a gun, driven around and dumped out in a bad neighborhood in the middle of the night is unconscionable.

He also asserts that the crime was not callous because the victim and his sister were left on a residential street where the sister got help at the first house she ran to and the victim was able to retrieve his cell phone and use it to call the police. However, it was still callous of Luque to put the victim and especially the child out in a bad neighborhood they were unfamiliar with late at night. It was only through luck that the

[14] Both of these convictions occurred in 2006. He was sentenced to prison for both. Therefore, his assertion that "[o]nce the . . . convictions [which served as the basis for the enhancements] are removed, Luque's remaining convictions involve three misdemeanors for which he received probation" is belied by the record.

sister found a compassionate person to help her and the victim found his cell phone. It was certainly no thanks to Luque, who could have carjacked them closer to where he and his girlfriend first got into the victim's car, which would have been more familiar terrain to the victim and his sister.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

RICHLI
J.

KING
J.